UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANICE NADEAU, individually and on behalf of all others similarly situated, Plaintiff, v. EQUITY RESIDENTIAL PROPERTIES MANAGEMENT CORPORATION, Defendant.	INDEX NO.: 7:16-CV-07986-VLB-LMS ORAL ARGUMENT REQUESTED

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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO COMPEL ARBITRATION

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PRELIMINARY STATEMENT

This case does not belong in this Court or in any court. Plaintiff Janice Nadeau ("Plaintiff") and Defendant Equity Residential Properties Management Corporation ("Defendant") agreed to arbitrate the claims she asserts in her Complaint.[1] They also agreed to waive their respective rights to participate in a class or collective action against one another, opting instead for individual arbitration. Under these circumstances, individual arbitration is mandatory. Thus, the Court should grant Defendant's motion, stay this litigation, and order the parties to proceed with arbitration.

STATEMENT OF FACTS

Plaintiff's Claims

In this lawsuit, Plaintiff claims that Defendant forced her to work off the clock, in the form of reading and responding to text messages outside of scheduled hours. (*See* Complaint ¶ 12.) Plaintiff claims that she was not paid for reading and responding to text messages and contends that after-hours messages are a part of Defendant's unwritten policy to violate state and federal labor laws. (*See id.* ¶¶ 1, 13, and 16.) Plaintiff seeks relief, on behalf of herself and other employees similarly situated to her, under the New York Labor Law ("NYLL") and the Fair Labor Standards Act ("FLSA"). (*See id.* ¶¶ 1, 4, 26 and 31.)

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[1] The named defendant in this lawsuit (Equity Residential Properties Management Corporation) is a wholly-owned subsidiary of a Maryland real estate investment trust, Equity Residential. (*See* Declaration of Mary Pawlisa ("Pawlisa Decl.") ¶ 2.) Equity Residential Properties Management Corporation did not employ Plaintiff. (*See id.* ¶ 3.) This fact does not affect this motion, however, because the named defendant is included within the definition of "Company," as used to describe Plaintiff's counterparty in the arbitration agreement. (*See id.*, Exhibit ("Ex.") C, p. 2.) This broad definition was accepted by Plaintiff when she signed her acknowledgement and agreement to be bound by the employee handbook. (*See id.*, Ex. D.)

The Parties' Agreement to Arbitrate

As clearly set forth in her February 13, 2015 offer letter, which she accepted, Plaintiff's employment was contingent upon her agreeing to individual arbitration of certain employment disputes. (*See* Pawlisa Decl., Ex. A, p. 1.) To that end, Plaintiff signed and agreed to be bound by an arbitration agreement. (*See id.*, Ex. B, p. 1.) The arbitration agreement governs "certain types of employment related disputes." (*See id.*, p. 2) In particular, the arbitration agreement provides:

> Claims which must be settled by binding arbitration include, but are not limited to, claims arising under . . . the [FLSA] . . . any amendments to these acts, and any state or local employment related statute or ordinance, and any future federal, state or local employment related statutes or ordinances.

(*See id.*) In addition to resolving these types of disputes out of court, the arbitration agreement also binds the parties to individual arbitration and bars claimants from asserting arbitrable claims on a representative basis. Specifically, it states:

> This Agreement expressly prohibits any arbitration from proceeding as a class, collective or representative action, and any claims required to be arbitrated hereunder must be brought solely in the claimant's individual capacity.

(*See id.*) In addition to her offer letter and her signed agreement to arbitrate, Plaintiff also signed an acknowledgment form, indicating that she had received, reviewed, and would abide by Equity Residential' s 2015 Employee Handbook. (*See id.*, Ex. D, pp. 1-2.) That acknowledgement further solidified her agreement to arbitrate by accepting that:

> [i]n consideration of [her] employment and/or [her] continued employment with the company and the receipt of compensation and other benefits, [Plaintiff] and the company agree[d] to submit certain types of employment-related disputes to binding arbitration.

(*See* Pawlisa Decl. Ex. C, p. 25.)

ARGUMENT

I. Legal Standard

The standard of review that courts apply to a motion to compel arbitration is similar to that of a motion for summary judgment. *See, e.g., Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (charging district court with error for accepting allegations regarding the question of arbitrability as true). Specifically, if the Court is satisfied that the pleadings, discovery materials, and affidavits show that there is no genuine issue of material fact as to the making of the parties' agreement to arbitrate, the motion to compel should be granted. *See id*.

II. Defendant's Motion to Compel Should Be Granted and Arbitration of Plaintiff's Claims Should Be Ordered.

The Federal Arbitration Act ("FAA") authorizes this Court to enforce the parties' agreement to arbitrate. *See, e.g., AT&T Mobility LLC v. Concepcion*, 568 U.S. 333, 344, 131 S. Ct. 1740 (2011); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.,* 815 F.2d 840, 844 (2d Cir. 1987). The FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court recognizes, the FAA leaves no place for the exercise of discretion but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. *See Badinelli v. Tuxedo Club,* __ F. Supp. 3d __, 2016 WL 1703413, at *2 (S.D.N.Y. Apr. 25, 2016) (Briccetti, J.).

In ruling on a motion to compel arbitration, the Court must determine whether: (1) the parties agreed to arbitrate; (2) the agreement covers the claims at issue; and (3) Congress permits those claims to be decided in arbitration. *See Ryan v. JPMorgan Chase & Co.*, 924 F. Supp. 2d 559, 562-63 (S.D.N.Y. 2013) (Briccetti, J.). To satisfy its initial burden, Defendant need not establish that its "agreement would be *enforceable,* merely that [it] exist[s]." *Moton v. Maplebear Inc.*, No. 15-cv-8879-CM, 2016 WL 616343, at *4 (S.D.N.Y. Feb. 9, 2016) (emphasis in original), *appeal dismissed* (July 13, 2016). Once satisfied, Plaintiff "bears the burden of showing the agreement to be inapplicable or invalid." *Harrington v. Atl. Sounding Co., Inc.,* 602 F.3d 113, 124 (2d Cir. 2010) (citing *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 91–92 (2000)). Defendant meets its burden here; Plaintiff cannot carry hers.

A. Plaintiff and Defendant Agreed to Arbitrate.

As set forth above, there is no dispute that the parties agreed to binding individual arbitration. (*See* Complaint ¶ 20; *see also*, Pawlisa Decl., Exs. A-D.) Indeed, Plaintiff's offer letter described arbitration as a term of and condition for her employment, and Plaintiff accepted that offer. (*See id.,* Ex. A, p. 1.) The Arbitration Agreement was provided to Plaintiff at the time of her hiring, and Plaintiff read the agreement, understood it, signed it, and agreed to be bound by it. (*See id.*, Ex. B.) The employee handbook further provided information about the parties' commitment to arbitrate certain disputes. (*See id.*, Ex. C, p. 25.) Plaintiff read, understood, signed, and agreed to be bound by the provisions of the handbook. (*See id.*, Ex. D.) Moreover, by continuing her employment, Plaintiff accepted that certain employment disputes between the parties would be resolved by arbitration.

(*See* Pawlisa Decl. Ex. C., p. 25 and Ex. D.) A party who signs or accepts a written contract "is conclusively presumed to know its contents and to assent to them." *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir. 2004). Thus, Defendant meets its initial burden of proving an arbitration agreement exists between the parties.

It appears from certain allegations in the Complaint that are extraneous to her causes of action that Plaintiff will assert in response to Defendant's motion that the agreement to arbitrate is not enforceable due to waiver. If Plaintiff does so, Defendant will address those arguments and establish that they are baseless.

B. Plaintiff's Statutory Claims Are Expressly within the Scope of the Arbitration Agreement.

There is no dispute that Plaintiff's claims are squarely within the scope of the parties' arbitration agreement. As a general rule, the scope of arbitrable issues is to be interpreted broadly. *See Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 130 (2d Cir. 2015) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.") (*citing Moses H. Cone Mem. Hosp.,* 460 U.S. at 24–25, 103 S. Ct. 927 (1983)). The Arbitration Agreement expressly states that arbitrable claims are those arising under "the [FLSA]," "any amendments to th[is] act[]" and "any state or local employment related statute or ordinance." (*See* Pawlisa Decl., Ex. B, p. 2.) This language encompasses each of Plaintiff's claims. When this Court has been presented with nearly identical language and nearly identical claims, it has entered an order compelling arbitration. *See Ryan*, 924 F. Supp. 2d at 561. It must do the same here. Other courts in this district have likewise compelled arbitration in similar circumstances. *See, e.g., Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71, 75 (S.D.N.Y. 2015) (granting motion to compel arbitration of FLSA claim); *Arrigo v. Blue Fish Commodities*, 704 F. Supp. 2d 299, 301 (S.D.N.Y. 2010) (same). Because Plaintiff's claims are expressly within the scope of the parties' arbitration agreement, Defendant's motion should be granted.

C. Plaintiff's Statutory Claims Are Arbitrable.

In addition to being within the scope of the parties' agreement to arbitrate, Plaintiff's statutory claims are, in fact, amenable to arbitration. New York state law has long favored and encouraged arbitration. *See, e.g., Westinghouse Elec. Corp. v. New York City Transit Auth.*, 82 N.Y.2d 47, 53 (1993). The NYLL provides no exception to this rule.[2] *See, e.g., Ryan*, 924 F. Supp. 2d at 566 (compelling arbitration of NYLL claims); *Badinelli*, 2016 WL 1703413, at *6 (same). Like the NYLL, the FLSA has no opposition to arbitration. *See, e.g., Arrigo*, 704 F. Supp. 2d at 304 ("The Court therefore concludes that Congress did not intend FLSA claims to be non-arbitrable."), *aff'd*, 408 F. App'x 480 (2d Cir. 2011); *Perry v. New York Law Sch.*, No. 03-cv-9221, 2004 WL 1698622, at *2 (S.D.N.Y. July 28, 2004) ("FLSA claims are also arbitrable."); *Martin v. SCI Mgmt. L.P.*, 296 F. Supp. 2d 462, 467 (S.D.N.Y. 2003) ("[T]here is no indication that Congress intended any of the plaintiff's claims to be nonarbitrable."). In addition, resolution of these statutory wage and hour claims in arbitration becomes no less acceptable in the presence of a class or collective action waiver. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298-99 (2d Cir. 2013) (reversing lower court decision to deny motion to compel arbitration based on individual arbitration agreement and representative action waiver); *see also Raniere v. Citigroup Inc.*,

[2] Even assuming that the NYLL prohibited the arbitration of a wage and hour claim, which it does not, the FAA would displace such a prohibition. *See AT&T Mobility LLC*, 563 U.S. at 341.

533 F. App'x 11 (2d Cir. 2013) (unpublished summary order). Thus, the statutory claims asserted in Plaintiff's Complaint should be arbitrated per the parties' agreement.

CONCLUSION

An employee who signs an arbitration agreement is bound by her promise to arbitrate her claims. When the same employee foregoes a right to represent others in a lawsuit by waiving participation in class and collective actions, she remains bound by her promise and must arbitrate her claims alone. There is nothing for this Court to do under the simple set of circumstances presented here but compel arbitration. Defendant respectfully requests that its motion be granted and this litigation be stayed.

Dated: New York, New York
November 21, 2016

Respectfully submitted,

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